Supreme Court, U.S.
FILED

No. 06-1180 FEB 22 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEFFREY MILSTEIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not Petitioner Milstein's criminal sentence was unreasonable and illegal, in light of *U.S. v. Booker*, 543 U.S. 220 (2005), because the District Court failed to properly consider the factors listed in application note 3 to § 5G1.3(c) of the United States Sentencing Commission Guidelines when it decided to make the sentence partially (rather than completely) concurrent with an undischarged sentence in New York.

Whether or not the inclusion of minor misdemeanor convictions in the determination of a Defendant's criminal history category unduly, unfairly and prejudically altered the applicable Sentencing Guideline range, inappropriately and illegally resulting in a disparity between the imposition of criminal punishment and the offender's real conduct.

PARTIES TO THE PROCEEDING

Petitioner here is Jeffery Milstein, a Defendant in the district court and an appellant below.

Respondent here is the United States of America, the Plaintiff in the district court and appellee below.

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OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit is *unreported* and reprinted at Pet. App. 9a.

The order of the district court for the District of New Jersey is *unreported* and reprinted at Pet. App. 1a.

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its opinion on November 28, 2006. The United States Court of Appeals for the Third Circuit entered its judgment on December 5, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 4A1.1 provides in part:

> The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A
>
> (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
>
> (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

(emphasis not added).

U.S.S.G. § 4A1.2(c) provides in part:

> Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:
>
> (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:
>
> Careless or reckless driving
> Contempt of Court
> Disorderly conduct or disturbing the peace
> Driving without a license or with a revoked or suspended license
> False information to a police officer
> Fish and game violation
> Gambling
> Hindering or Failure to obey a police officer
> Insufficient funds check
> Leaving the scene of an accident
> Local ordinance violations (excluding local ordinances violations that are also criminal offense under state law)
> Non-support
> Prostitution
> Resisting arrest
> Trespassing.

U.S.S.G. § 5G1.3(c) states:

> (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to

the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT OF THE CASE

The focus of the petition currently before the Court arises out of a history of unfortunate events which began sometime in 1980. At that time, the Petitioner (hereinafter "Mr. Milstein") was employed as a controller for Revillion, Inc. (a fur concession in Saks Fifth Avenue Stores). Mr. Milstein's responsibilities included the payment of invoices, execution of checks, handling employee problems and the conduct of inventory.

At some time in 1983, after providing testimony in a sexual harassment lawsuit against the President of Revillion, Inc., Mr. Milstein was unilaterally and unceremoniously discharged from that employment. He then proceeded to open his own accounting practice in 1983.

One night in 1983, when Mr. Milstein had returned home from work, two individuals from the New York City Sheriffs' office apparently approached Mr. Milstein and proceeds with a lengthy questioning over the next two hours, Mr. Milstein answered all their questions truthfully and to the best of his knowledge.

Several months later, Mr. Milstein received a telephone call informing that he was being arrested and charged for falsifying business records while at Revillion, Inc. The business records in question, quarterly New York City sales tax reports had been prepared by Mr. Milstein's assistant. As such, Mr. Milstein was provided with an opportunity to plead guilty to a lower Class E Misdemeanor, in light of his mere "rubberstamping" of the business records paperwork. Counsel for Mr. Milstein apparently advised Mr. Milstein that a

Class E Misdemeanor was the lowest possible offense and the best avenue for bringing closure was to plead guilty. Mr. Milstein did indeed plead guilty and was sentenced to a five-hundred dollar ($500) fine.

After that matter and well over the next ten years, Mr. Milstein was a model citizen working as a public accountant. Mr. Milstein continued as a public accountant absent anything before being introduced to an unsavory character named Marc Rousso.

Mr. Rousso, a co-conspirator, was charged with securities fraud by law enforcement authorities in the Republic of France, and had relocated to the United States where he remained a fugitive from the criminal justice authorities of France. Apparently although neither licensed by nor registered with any federal regulatory agency of the United States, Rousso nevertheless surreptitiously held himself out as a mergers and acquisition consultant who controlled and promoted various public companies and caused securities to be purchased and sold on behalf of individuals and companies.

On May 17, 1998, and June 29, 1998, Mr. Millstein met with Mr. Rousso at 466 Gin Lane, Southampton, New York ("Southampton property"), which was owned and controlled by Mr. Rousso under the company name Benson Holdings. The Southampton property was valued in excess of $1,000,000 and Mr. Rousso had put a substantial amount of money into the renovations on the property. During the two meetings, Mr. Rousso informed Mr. Milstein of plans to conceal the imminent proceeds from the sale of that property as capital gains from the Internal Revenue Service. Subsequently, Mr. Milstein and Mr. Rousso transferred approximately $400,000 in real estate sales proceeds to various third parties for satisfaction of purported business loans and/or services that had never actually been rendered using false promissory

notes that were fabricated by Mr. Rousso. The cooperating third parties were then instructed to return the diverted funds to Mr. Rousso's foreign bank accounts or with other assets. Mr. Rousso purposely failed to file a tax return for tax year 1998, and did not otherwise report the $400,000 in sale proceeds as taxable income. Mr. Rousso was therefore able to obtain the proceeds of this sale without disclosure to the IRS, thereby evading the payment of taxes. Mr. Milstein also prepared federal income tax returns for Mr. Rousso's wife, a longtime client, that apparently contained false information regarding the status of her marriage to Rousso.

Pursuant to a written plea agreement with the United States Attorney's office dated January 10, 2000, the Mr. Milstein agreed to enter a guilty plea to Count One of an indictment alleging conspiracy to defraud the Internal Revenue Service.

Accordingly, on May 15, 2000, Mr. Milstein entered a plea of guilty before the Honorable William G. Bassler, U.S.D.J.

It was then on March 31, 2004, in a wholly separate matter that Mr. Milstein was sentenced 63 months imprisonment (46 months and an additional 17 months in light of the commission of the above prior criminal violation pending disposition of the instant matter) before the U.S. District Court for the Southern District of New York (J. Shirely Wohl Kram) on two counts of conspiracy to commit Mail and Wire Fraud.

On August 3, 2005, the Defendant-Appellant was sentenced (in the instant case) by the United States District Court for the District of New Jersey (J. William G. Bassler) to a term of 24 months, to be served, as follows: 17 months to be served concurrent to the sentence imposed and already being served by the U.S. District

Court for the Southern District of New York, and seven months consecutive to the Southern District of New York sentence for a total of 24 months.

On December 5, 2006, the United States Court of Appeals for the Third Circuit affirmed the August 3, 2005 the imposition of sentence by the United States District Court for the District of New Jersey (J. William G. Bassler).

REASONS FOR GRANTING THE PETITION

POINT I

The failure to properly consider the factors listed in application note 3 to U.S.S.G. § 5G1.3 constitutes an unreasonable and illegal imposition of a criminal sentence.

This court has previously announced that criminal sentences made by judges, in consultation with the sentencing guidelines, would be upheld on appeal so long as they were not "unreasonable." *U.S. v. Booker*, 543 U.S. 220, 263 (2005). It is the contention of Mr. Millstein that the District Court's (J. William G. Bassler) failure to properly consider the factors set forth in application note 3 of U.S.S.G. § 5G1.3 in determining whether to run the sentences of petitioner concurrently was unreasonable.

The quandary in this and in other matters now actively before this Court is what is the meaning and thereafter the proper application of the Sentencing Guidelines in achieving a reasonable sentence. This conundrum finds its historical origins in the original debate and confinement of the Sentencing Guidelines when the philosophical and jurisprudential attack criticized the Sentencing Guidelines for its evisceration of judicial discretion.

Now with the issuance of *U.S. v. Booker*, *supra*, it appears that judicial discretion has been momentarily restored under the umbrella of reasonableness, absent any real guidance or instruction as to the applicable meaning of that term.

This Court previously emphasized that an appellate court reviewing the imposition of a criminal sentence of the District Court, should do so only under the reasonableness standard. *U.S. v. Booker*, *supra*. This Court's decision in *Booker* sent shockwaves into the arena of sentencing jurisprudence when it further announced that the "reasonable standard" applied not merely to appellate review of district court departures from the guidelines, but rather this standard applied "across the board" to all appellate review of district court guideline determinations. *Id.* at 260. Mr. Milstein most respectfully contends that the reasonableness standard was not and should have been properly applied to the case at bar, as it involved a guideline determination, where the reasonableness standard was not yet cried out to be properly employed.

U.S.S.G. § 5G1.3 covers the imposition of a sentence on a defendant subject to an undischarged term of imprisonment. Of particular importance, subsection (c) notes, "[I]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense."

By way of further commentary, application note 3 provides:

> (a) *In General.*—Under subsection (c), the court may impose a sentence concurrently, partially

concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (*e.g.*, determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstances relevant to the determination of an appropriate sentence for the instant offense.

Mr. Milstein respectfully contends that under these well-established criteria, the District Court was unreasonable in not allowing his sentences to run concurrently in their entirety. The district court had the exclusive opportunity and in fact made the observation with respect to how bad Mr. Milstein looked and that further the Court had no idea what impact jail had already had on Mr. Milstein. Unfortunately, the best evidence of Mr. Milstein having already been battered and reduced by jail was Mr. Milstein himself. Not shockingly or sur-

prisingly, counsel averred that enough was enough, asking for mercy, compassion and certainly reasonableness.

Mr. Milstein first addresses the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)).

Mr. Milstein undoubtedly admits to the severity of the crime, but also notes his complete cooperation with law enforcement officials and is certainly not a candidate for recidivist conduct. While Mr. Milstein concedes that there is a need to punish his actions, he does not necessarily agree that the need to run part of his sentence consecutively was imperative. A twenty-four month prison sentence for the instant offense was to run concurrently, clearly reflects the seriousness of the offense and provides adequate deterrence to future offenders. Furthermore, the petitioner is of an advance age and has repeatedly acknowledged the wrongs of his actions. Mr. Milstein has already been deterred from committing future crimes due to the length of the past sentence and running the sentence of the instant offense consecutively does not further any legitimate purpose, while significantly and obviously ignoring any notion of the reasonableness standard.

The court should have also properly recognized that Mr. Milstein will serve an inordinate amount of time for the instant offense if he is required to serve any portion of his sentence consecutively. Mr. Milstein has already plead guilty to one count of conspiracy to defraud the Internal Revenue Service. While Mr. Milstein admittedly comprehends the error of his ways, the punishment of running any portion of the sentence for the instant offense concurrently renders the entire scenario to a level of super-punitive sentencing jurisprudence which is obviously and clearly disproportionate to the crime. But it is evident now that one Courts attempt to employ

fairness in imposing punishment results as here in an evisceration of the reasonableness stan ard.

The principle of proportionality has been ingrained in our legal system since colonial times, which served as the source of many constitutional provisions. The Charter of Rhode Island, adopted in 1663, specifically referred to the proportionality of punishments, requiring "the imposing of lawfull and reasonable ffynes . . . and imprisonments." *Sources of Our Liberties*, R. Perry & J. Cooper eds., 773 (1959). Following the independence of our nation, many states adopted a similar stance in their constitutions or declaration of rights, including Pennsylvania, South Carolina and Virginia. Pa. Const. § 38; S.C. Const. § XL (1776); Va. Decl. of Rights, Art. I, § 9 (1776). Ultimately, the goal of these states, and that of the Eighth Amendment, was to continue the ban on disproportionate punishment.

Continuing with the factors listed in application note 3 of § 5G1.3, Mr. Milstein respectfully contends that the length of the current undischarged sentence, if the notions of the reasonableness jurisprudence is followed, favors running the sentence for the instant offense concurrently. At the time Mr. Milstein was sentenced in the instant offense, he had an undischarged sentence of forty-six (46) months remaining. The length of the undischarged sentence, in combination with Mr. Milstein's advance age highly favored running the sentences concurrently.

The final factor listed under application note 3 constructively acts as a catch-all provision, allowing the court to take into account any information which may be relevant to the Court's determination. Mr. Milstein presented three distinct characteristics, some of which have been discussed above, which favor running the sentence for the instant offense concurrently. First, Mr. Milstein

is of an advanced age and running any part of his sentence consecutively would act to disproportionately punish him for his actions. Second, Mr. Milstein lost his license as a certified public accountant due to this actions leading to the instant offense. As such, when Mr. Milstein returns to society, he will need to train and find a new vocation, but at his advanced age, every extra month Mr. Milstein remains away unfairly acts to make this transition more difficult. Finally, Mr. Milstein, at his age is not a candidate for recidivism. Failing to run the sentence for the instant offense concurrently only delays prejudices and disproportionately depletes Mr. Milstein's chances of success upon his return to society.

The combination of all these factors highly favored the district court running the sentence of Mr. Milstein for the instant offense completely concurrently with his undischarged term of imprisonment. The District Court's failure to do so created a criminal sentence which was in reality service of a double sentence and otherwise notoriously punitive rather than some modicum of reasonableness.

As fully discussed above, Mr. Milstein is of an advanced age, has fully accepted responsibility for his actions and running any portion of petitioner's sentence consecutively would constitute a disproportionate punishment for the offender's real conduct.

This Court is left with the task of preserving the rights of these sentenced and to see that such dispositions proceed consistently and reasonably.

POINT II

Inclusion of a minor misdemeanor conviction (seventeen (17) years prior to instant conviction) in the calculation of a Defendant's Criminal History Category unduly and unfairly alters the applicable guide range, inappropriately resulting in a disparity between the punishment and the offender's real conduct.

This Court's decision in *Booker* emphasized the importance of ensuring that the criminal punishment meted out correlated with the offender's real conduct, thus bringing a manner of uniformity to the criminal sentencing system. As noted by this Court, of critical importance in "passing the Sentencing Act was to move the system in the direction of increased uniformity." *Id.* at 253 (*citing* 28 U.S.C. § 991(b)(1)(B)). More importantly, this Court noted that uniformity meant more than "similar sentences for those convicted of violation of the same statute . . . [but] more importantly, of similar relationships between sentences and real conduct . . .". *Id.* at 253-54.

With emphasis on the need for uniformity of punishment for the offender's real conduct, this Court rendered the Sentencing Guidelines advisory absent real guidance on some application of the principles of reasonableness in sentencing. The district court's decision to include a minor misdemeanor conviction, which occurred seventeen (17) years prior to the instant offense, in its criminal history calculation analysis acts to belie the policy established in *Booker*.

Mr. Milstein admittedly recognizes the policy of sentencing to punish recidivist conduct harshly. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 278 (1980). The ques-

tion, however, that surfaces over and over again is whether there is no balance or equity in sentencing. There are two reasons why *Rummel* might not be applicable to the case at bar and why *Rummel* is distinguishable.

First, the conviction in question here was a minor Class E misdemeanor conviction. Recently, the court noted in *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000), that "common law punishment for misdemeanors —those smaller faults, and omissions of less consequence" should not include imprisonment. "Actual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for the 'idea of prison as a punishment would have seemed an absurd expense.' " *Id.* (citations omitted).

Further, in *U.S. v. Watts*, this Court reiterated that "Very roughly speaking, relevant conduct corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." 519 U.S. 148, 152 (1997)(*citing Witte v. United States*, 515 U.S. 389, 402 (1995)). Further, this Court stated that "[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior," in upholding the constitutionality of considering such previous conduct. *Nichols v. United States*, 511 U.S. 738, 747 (1994)(*citing Williams v. New York*, 337 U.S. 241 (1949)).

Second, the minor misdemeanor conviction was temporally distant from the instant offense. Mr. Milstein pled guilty to a minor Class E misdemeanor in 1983. His disposition did not call for imprisonment and otherwise a *de minimus* fine (only a $500 fine). Between the time he pled guilty in New York State Court to the time a

guilty plea was entered for the instant offense, Mr. Milstein was without any criminal problems.

Mr. Milstein further asserts that to raise the criminal history category for a misdemeanor transgression seventeen (17) years prior to the instant offense has unduly altered and in reality unfairly heightened his criminal punishment. Particularly since Mr. Milstein is not given any credit for not participating in recidivist conduct during that time period.

An example may help illustrate this point. If "Defendant X" had pled guilty to the same crime as Mr. Milstein and had the exact same criminal history, with the exception that his prior misdemeanor had occurred only one year prior to the instant offense, they would be placed in the same criminal history category. Yet, the real conduct and criminal history of Defendant X and Mr. Milstein are significantly different. Defendant X clearly intimates a course of recidivist conduct as evidenced by his temporally close offenses. As such, placement of Defendant X in criminal history category III is justified. However, Mr. Milstein's prior misdemeanor offense occurred nearly two decades prior to the instant offense, hardly acting as an indicia of recidivism. Yet, Mr. Milstein is also designated to an unwarranted criminal history category with no consideration for the passage of time.

Petitioner asks this Court adopt a new measure of determining the offender's past criminal history conduct. Undoubtedly, the petitioner agrees that consistent and high levels of recidivist conduct should be part of the analysis in the determination of an appropriate criminal punishment. However, petitioner asks that this Court adopt a relevant standard to assist district courts in properly disregarding prior conduct or offenses which are so minor or temporally distant as to not warrant consider-

ation. Otherwise, minor transgressions may act to unduly alter a criminal punishment inordinately with respect to the offender's real conduct.

This is the exactly the type of situation which the Court sought to avoid when declaring the Sentencing Guidelines to be advisory. A rote application of the criminal history calculation acts to significantly weaken the tie between a criminal sentence and the offender's real conduct. The petitioner harbors no doubt as to the severity of his crime, however, he also has no doubt that the criminal punishment imposed unfairly placed an undue amount of emphasis on his criminal history and conduct and further never entered the analytical realm of the reasonableness standard.

CONCLUSION

There comes a moment in the analysis of sentencing dispositions when the Court ought to properly temper punishment with mercy. This is such a matter.

Each of the judges is permitted to bring their own life experience barometers. However, the Court's own personal measuring stick may not be allowed to interfere with fundamental fairness. Fundamental fairness, as we have recently seen in *U.S. v. Booker*, *supra*, does not mean uniformity. To the contrary necessarily, there has been no rejection of uniformity which has brought us to the crossroads of reasonableness. This case is a clear example of this reasonableness debate and a perfect scenario for the tempering of punishment with mercy had reasonableness been defined by some explanatory guideposts.

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number 2:00cr301-01
Filed August 4, 2005

UNITED STATES OF AMERICA

—v.—

JEFFREY MILSTEIN

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JEFFREY MILSTEIN, was represented by Peter Till, Esq.

The defendant pled guilty to count(s) 1 of the Indictment on 5/15/2000. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense
18:371	CONSPIRACY TO DEFRAUD THE UNITED STATES

Date of Offense	Count Number(s)
5/97 TO 4/99	1

As pronounced on 3 August 2005, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) 1, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 4th day of August, 2005.

WILLIAM G. BASSLER

WILLIAM G. BASSLER
Senior United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 Months, consisting of 17 months to run concurrently to the sentence imposed in SDNY case number 3-01171, and 7 months to run consecutively to sentence imposed in SDNY case number 3-01171.

The Court makes the following recommendations to the Bureau of Prisons: Continue to serve his sentence at Fort Dix.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____ At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (on the next page).

The defendant shall submit to one drug test within 15 days of commencement of supervised release and

at least two tests thereafter as determined by the probation officer.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

The defendant shall provide the U.S. Probation office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine obligation or otherwise has the express approval of the Court.

The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of supervision. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with infor-

mation pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not file any tax returns without prior approval of the United States Probation Department.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

FINE

The defendant shall pay a fine of $10,000.00.

This fine, plus any interest pursuant to 18 U.S.C. § 3612(f)(1), is due immediately and shall be paid in full within 30 days of sentencing. The defendant shall par-

ticipate in the Bureau of Prisons Inmate Financial Responsibility Program.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3848

UNITED STATES OF AMERICA,
Appellee,

—v.—

JEFFREY MILSTEIN,
Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. Crim. No. 00-301)
District Judge: Honorable William G. Bassler

Submitted Under Third Circuit L.A.R. 34.1(a)
November 28, 2006

Before: FUENTES and GARTH, *Circuit Judges*,
and POLLAK, *District Judge*[1]
(Filed: December 5, 2006)

OPINION

Garth, *Circuit Judge*:

Jeffrey Milstein appeals his sentence as unreasonable and in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. We have jurisdiction pursuant to 18 U.S.C. § 3742(a). We will affirm.

I

Because the parties are familiar with the facts of this case, we will not recite them here except as necessary to the instant discussion. Milstein was a public accountant who repeatedly used his accounting expertise to assist his clients in illegal, fraudulent schemes. In the spring and summer of 1998, Milstein aided Marc Rousso, a fugitive fleeing securities fraud charges in France, in concealing from the Internal Revenue Service $400,000 in proceeds from Rousso's sale of real property. PSR ¶ 9. When agents of the Federal Bureau of Investigation ("FBI") interviewed Milstein about his activities with Rousso, Milstein lied to them. PSR ¶ 10. On May 15, 2000, pursuant to a cooperating plea agreement Milstein pleaded guilty in the United States District Court for the District of New Jersey to a one-count information charg-

[1] The Honorable Louis H. Pollak, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

ing conspiracy to commit tax fraud in violation of 18 U.S.C. § 371.

Even after this guilty plea, however, Milstein continued to exploit his skills as an accountant to engage in fraudulent investment schemes. In June 2003, an undercover FBI agent posing as a wealthy investor met with one of Milstein's co-conspirators and expressed interest in investing several million dollars in LJD Resources ("LJD"), a supposed business for which Milstein served as the accountant. PSR ¶ 34. The co-conspirator provided the agent with materially false financial statements for LJD, which had been prepared by Milstein. App. 130. The agent later telephoned Milstein with questions about the financial statements, and Milstein confirmed that the information was correct even though he knew it was not. App. 130. As a result of his involvement in the LJD investment scheme, Milstein pleaded guilty on November 19, 2003 in the United States District Court for the Southern District of New York to a one-count indictment charging conspiracy to commit wire fraud. During the guilty plea hearing, Judge Kram informed Milstein that he was subject to an enhanced sentence pursuant to 18 U.S.C. § 3147[2] because he had committed the wire fraud offense while on pre-sentence release for the earlier tax fraud offense. App. 127.

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[2] The statute provides:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. § 3147.

On March 31, 2004, Judge Kram, noting Milstein's guilty plea in this case as well as a prior conviction in New York state court for falsifying business records, imposed a sentence of 46 months' imprisonment for the wire fraud conspiracy offense and a consecutive sentence of 17 months' imprisonment pursuant to 18 U.S.C. § 3147. App. 143, 154.

For the tax fraud conspiracy offense, the Probation Office, using the 1998 Edition of the Guidelines Manual, determined that Milstein's Base Offense Level pursuant to U.S.S.C. § 2T1.4(a)(1) was 13, based on a tax loss of $55,000. PSR ¶ 18, U.S.S.C. § 2T4.1(H). His Total Offense Level was 15, because Milstein, as a certified public accountant, warranted the two-level enhancement in U.S.S.C. § 2T1.4(b)(1). PSR ¶ 19, 23. Probation recommended against a downward adjustment for acceptance of responsibility because, *inter alia,* Milstein lied during his Probation Office interview about his conduct in this offense. *See* PSR ¶¶ 1516. Probation also determined that Milstein's state court conviction and sentence for falsifying business records and his conviction and sentence in the Southern District of New York for conspiracy to commit wire fraud resulted in a total of four Criminal History Points, and thus a Criminal History Category of III and an advisory guidelines range of 24-30 months' imprisonment. PSR ¶¶ 29-34, 36, 66.

Before sentencing, Milstein wrote to object to this advisory sentence on a number of grounds. He challenged the withholding of a downward adjustment for acceptance of responsibility, Probation's calculation of the tax loss and the resulting base offense level, and the two-level enhancement under U.S.S.C. § 2T1.4(b)(1). App. 85-86. Milstein also sought a downward adjustment on four additional grounds: (i) the loss amount overstated the seriousness of the offense, U.S.S.C. § 2F1.1

cmt. n.11; (ii) Milstein had no intent to violate the criminal law, U.S.S.C. § 5K2.11; (iii) he suffered "collateral consequences" of his conviction, including the "loss of employment opportunities," U.S.S.C. § 5K2.0; and (iv) since the offense, he has been rehabilitated. App. 87-93. Finally, Milstein argued that the 18 U.S.C. § 3553(a) factors merited a sentence of "time served," or in the alternative, that any sentence imposed in this case be ordered to run fully concurrently with the sentence imposed by the Southern District of New York. App. 94-96.

The government filed a written response, disputing Milstein's challenges to the calculation of the guidelines range and opposing his motion for downward departures. The government did agree, though, that a partially concurrent sentence would be appropriate, given that the sentence on the wire fraud conspiracy conviction had been increased by 17 months under 18 U.S.C. § 3147. App. 112-18.

At sentencing on August 3, 2005, Milstein raised additional claims. Pursuant to U.S.S.C. § 4A1.1(c), no Criminal History Point should be assigned for his state court conviction for falsifying business records. According to Milstein, because the crime was a misdemeanor rather than a felony, the addition of a Criminal History Point was in error and without that fourth point, Milstein's Criminal History Category would be II rather than III. App. 23. Milstein also argued for a reduced sentence based on his remorse. App. 22.

Judge Bassler first identified all the issues raised by Milstein's written submission, which the Judge had read "several times." App. 17. After argument by Milstein's counsel and the government's response, the District Court expressly rejected as meritless both Milstein's objection to the two-level increase under U.S.S.C. § 2T1.4(b)(1) and his objection to the withholding of a

reduction for acceptance of responsibility. App. 27-28. Judge Bassler even re-read the plea allocution to satisfy himself that Milstein had provided inconsistent—and thus, false—information to the FBI regarding his conduct in this offense. App. 28. Next, turning to Milstein's motion for a downward departure, Judge Bassler "decline[d] to downward depart . . . because in evaluating every reason I have looked at in the briefs, I just simply don't think they justify a downward departure." App. 29. Then, evaluating Milstein's case using the sentencing factors listed in 18 U.S.C. § 3553(a), the District Court concluded that none justified a reduction in the advisory sentence. App. 29-30. The District Court also rejected Milstein's challenge to the Criminal History Category, finding that U.S.S.C. § 4A1.2(c) expressly counted sentences for certain prior misdemeanor convictions. App. 31.

After allowing defense counsel an opportunity to argue the extent to which this sentence should run concurrently with the sentence in the wire fraud conspiracy case, and after giving Milstein an opportunity to address the Court, Judge Bassler imposed a sentence of 24 months' imprisonment, 17 months of which would be served concurrently to the wire fraud conspiracy sentence. Supplemental App. 1-2. The Court also imposed a three-year term of supervised release, a $100 special assessment, and a $10,000 fine. The Court explained that these two crimes could have justified fully consecutive sentences, but that he granted a substantial period of concurrency because of the 17-month portion of the sentence Judge Kram imposed under 18 U.S.C. § 3147. App. 38.

II

Milstein first contends that the imposition of a partially concurrent–rather than an entirely concurrent–sentence violated the Double Jeopardy Clause by doubly punishing him for the tax fraud offense. This argument is wholly without merit. The extra 17 months' imprisonment Milstein received for wire fraud conspiracy was not "punishment" for the tax fraud offense for Double Jeopardy purposes. *See Witte v. U.S.*, 515 U.S. 389 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' ") (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)). Indeed, even fully consecutive sentences for these two entirely separate crimes would not have violated the Double Jeopardy Clause.

Next, Milstein argues that the District Court erred in attributing a Criminal History Point to his prior New York state court conviction and sentence for falsifying business records in violation of McKinney's Penal Law § 175.05. This argument, as well, is without merit. Under U.S.S.C. § 4A1.1(c), one Criminal History Point is added for each prior criminal sentence which did not result in at least sixty days' imprisonment. Because Milstein paid a $500 fine but was not imprisoned for the New York state conviction, the District Court accorded one Criminal History Point under that section. PSR ¶ 30. However, Milstein claims that his prior sentence falls within the category of certain excluded misdemeanor and petty offenses for which, circumstances depending, a criminal

history point is not assigned. *See* U.S.S.C. § 4A1.2(c).[3] The misdemeanor and petty offenses which can qualify

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[3] Section 4A1.2(c) states:

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fish and game violations Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)
Non-support
Prostitution
Resisting arrest
Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Hitchhiking
Juvenile status offenses and truancy
Loitering
Minor traffic infractions (e.g., speeding)

for the exclusion are listed in U.S.S.C. § 4A1.2(c), and the offense of falsifying business records is not among them. Furthermore, Milstein does not identify—and this Court does not find—any of the offenses listed in § 4A1.2(c)(1) or (2) to be sufficiently analogous to the offense of falsifying business records as would justify including his prior offense among those which can qualify for the exclusion. *See United States v. Elmore*, 108 F.3d 23, 27 (3d Cir. 1997) (holding that, in the Third Circuit, the determination of whether a prior conviction is for an offense sufficiently similar to one of the identified offenses in U.S.S.C. § 4A1.2(c) turns on a comparison of the elements of the offense of the prior conviction and the proposed analogous offense under § 4A1.2(c)). Thus, because Milstein's prior sentence does not qualify for the exclusion provided by § 4A1.2(c), the District Court did not err by finding that Milstein's prior sentence warranted the addition of a Criminal History Point.

Third, Milstein maintains that his sentence was unreasonable. In reviewing a sentence for unreasonableness, our inquiry proceeds in two steps. First, this Court must be satisfied that the District Court gave "meaningful consideration" to the sentencing factors listed in 18 U.S.C. § 3553(a). *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006). It is not necessary for the sentencing court to "discuss every argument made by a litigant if an argument is clearly without merit." *Id.* (citation omitted). Neither is it necessary for the sentencing court to "discuss and make findings as to each of the § 3553(a) factors if the record makes clear the court took the fac-

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Public intoxication
Vagrancy.

U.S.S.C. § 4A1.2(c).

tors into account in sentencing." *Id.* (citations omitted). However, "a rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it." *Id.* (citation omitted). Indispensable to the District Court's task of giving "meaningful consideration" to the sentencing factors is that court's calculation of the correct guidelines range applicable to the particular case. *Id.* at 330. Second, after finding that the sentencing court did meaningfully consider the factors listed in 18 U.S.C. § 3553(a), we must also make sure the sentencing court reasonably applied those factors to the circumstances of the case. *Id.* In this second step, a Court of Appeals must "apply a deferential standard, the trial court being in the best position to determine the appropriate sentence." *Id.* Finally, the party challenging the sentence bears the burden of proving its unreasonableness. *Id.* at 332.

Milstein asserts that the District Court did not reasonably apply the sentencing factors to the circumstances of the case, and more specifically, that the Court gave inadequate consideration to Milstein's asserted remorse and lack of recidivism. We find, however, that Milstein has failed to show that the sentence he received was unreasonable. As demonstrated in the above discussion of the appropriate number of Criminal History Points Milstein merited, Milstein's only challenge to the District Court's calculation of the guidelines range is rejected. In addition, as the above recitation of the facts chronicles, the District Court meaningfully addressed and resolved each of the claims presented by Milstein in his written sentencing submission and those he raised at his sentencing hearing. Furthermore, the record reflects the District Court's explicit consideration of the statu-

tory sentencing factors. App. 29. As for Milstein's contention that the District Court, in applying these factors to his circumstances, did not recognize his "remorse and lack of recidivism," it is rejected. First of all, the District Court, noting Milstein's prior convictions for falsifying business records and for conspiracy to commit wire fraud, properly found that Milstein was, in fact, a recidivist. App. 30. Regarding Milstein's asserted remorse, given our deferential standard of review and the fact that Milstein's letter to the judge presented no exceptional circumstances, we cannot say that the District Court, in imposing a sentence of imprisonment largely concurrent with the sentence Milstein was currently serving for wire fraud conspiracy, unreasonably applied the sentencing factors to Milstein's case.

For these reasons, we will affirm.

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Submitted Under Third Circuit L.A.R. 34.1 (a)
November 28, 2006

Before: FUENTES and GARTH, *Circuit Judges*, and POLLAK, *District Judge*[1]

JUDGMENT

IT IS NOW HEREBY ORDERED AND ADJUDGED by this Court that the sentence imposed by the District Court on August 3, 2005 be, and the same hereby is, affirmed.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: December 5, 2006

[1] The Honorable Louis H. Pollak, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.